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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

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In the Matter of

Geographic Partitioning and
Spectrum Disaggregation by
Commercial Mobile Radio
Services Licensees

Implementation of Section
257 of the Communications
Act - Elimination of Market
Entry Barriers

WT Docket No. 96-148

GN Docket No. 96-113

To: The Commission

REPLY TO OPPOSITIONS TO
PETITION FOR RECONSIDERATION OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION AND
THE INDEPENDENT ALLIANCE

Pursuant to Section 1.429 of the Commission's Rules,¹ the National Telephone Cooperative Association and the Independent Alliance (collectively referred to hereafter as the "Petitioners") respectfully submit this Reply to Oppositions to the Petition for Reconsideration filed in this docket by the Petitioners on February 5, 1997.²

I. INTRODUCTION.

Petitioners request reconsideration of the Commission ruling that permits all entities eligible to be PCS licensees to acquire

^{1/} 47 C.F.R. § 1.429.

^{2/} Petition for Reconsideration of the National Telephone Cooperative Association and the Independent Alliance (filed Feb. 5, 1997) ("Petition").

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geographically partitioned spectrum. Petitioners request that the Commission, consistent with its findings in the record and in accordance with its statutory mandate, establish rules that provide opportunities for all rural telcos. The right to acquire geographically partitioned spectrum had previously been accorded to rural telephone companies only. This criterion was enacted by the Commission as its fulfillment of a Congressional mandate to ensure the promotion of rural telcos in the provision of spectrum-based services. Rural telcos formulated and embarked upon business plans that were based upon the expectation that the Commission's partitioning rules would permit only rural telcos post-auction acquisition of licenses. But, after the deadline for entering the auction had passed, the Commission removed the partitioning rule reserved for rural telcos and imperiled the business plans of entities that had structured their strategies in reliance upon Commission policies. The elimination of the provision for which all rural telcos were eligible marks a failure of the Commission to fulfill its Congressional mandate. Further, the change in the rules after the auction was underway is inequitable, and is contrary to fundamental fairness, justness, and right dealing. Accordingly, reconsideration of the rules is appropriate.

**II. PETITIONERS HAVE MET THE STANDARDS NECESSARY TO INVOKE A
PETITION FOR RECONSIDERATION.**

Reconsideration of the Commission's ruling is appropriate. Although GTE Service Corporation ("GTE") states that Petitioners have not met the requirements governing Petitions for

Reconsideration,³ the Rule cited by GTE does not limit Petitions for Reconsideration to circumstances in which new facts surface after a decision has been issued. Rather, that Rule places limitations on the type of new information that can be introduced in a Petition for Reconsideration.⁴

By contrast, the Petition for Reconsideration submitted by the Petitioners relies upon the established record of this proceeding; Petitioners are not pointing to new facts in their request for reconsideration. Instead, as Petitioners pointed out in their Petition for Reconsideration, they request reconsideration because the Commission failed to arrive at a reasoned decision or to give adequate consideration to proposals on the record. For example, Petitioners point out that the Commission did not even perform the required Regulatory Flexibility Act Analysis to determine whether alternatives submitted on the record might reduce the adverse economic impact the Commission's rule change would have on the rural telephone companies covered by the Regulatory Flexibility Act.⁵ The record in this proceeding does not support the conclusion that the Commission reached.

³/ Opposition of GTE Service Corp. at 2, 3.

⁴/ See 47 C.F.R. 1.429(b).

⁵/ Petition at note 27.

III. THE COMMISSION IS REQUIRED, IN ACCORDANCE WITH SECTION 309(j), TO PROMOTE THE PARTICIPATION OF RURAL TELEPHONE COMPANIES IN THE PROVISION OF SPECTRUM-BASED SERVICES.

The Commission is directed by Section 309(j) of the Communications Act to "promote" opportunities for rural telcos to participate in the provision of spectrum-based services.⁶ The Commission provided geographic partitioning, reserved exclusively to rural telephone companies, as the sole means of fulfilling its Congressional mandate:

We have decided not to adopt any other auction-related measures specifically for rural telephone companies in this Order. We believe that the partitioning plan we are adopting will provide rural telephone companies with substantial capabilities to acquire licenses to provide broadband PCS. . . .⁷

No other mechanism that could be applied to every rural telco was created by the Commission. The assertion of AT&T that partitioning was "not the only step the Commission took" that ensured opportunities for rural telcos⁸ is inaccurate: geographic partitioning was the only mechanism available to every rural telco, without exception. Rural telcos were included in the statute as a class to be distinguished from other designated entities, and were not intended to be swept by the Commission under the general rubric

⁶/ 47 U.S.C. § 309(j).

⁷/ In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding: Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532, at para. 153 (rel. Jul. 15, 1994) ("Competitive Bidding Fifth R&O").

⁸/ Opposition of AT&T Wireless Services, Inc. at 2.

of "small business."⁹ Rural telcos that did not meet certain financial requirements were ineligible for credits and other preferences granted to other classes of designated entities. Indeed, the Commission considered, and then rejected, a plan that would have extended bidding credits to all rural telephone companies.¹⁰ Geographic partitioning was "narrowly tailored" to, and reserved for, rural telcos.¹¹ It is arbitrary for the Commission to "tailor" a remedy and then withdraw it without a substitute. The Commission's assertion that rural telcos retain the "small business" preference is incorrect. Not all rural telcos will qualify as a "small business" if the Commission adopts, as it should, the definition provided by the Telecommunications Act of 1996 for a "rural telephone company."¹²

⁹/ See House Conference Report No. 103-213 at 484 ("The Conferees also agreed to require that the Commission provide economic opportunities for rural telephone companies in addition to small business [sic] and businesses owned by members of minority groups and women.") See also Competitive Bidding Fifth R&O at para. 153.

¹⁰/ See In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding: Second Report and Order, PP Docket 93-253, 9 FCC Rcd 2348, at paras. 243, 244 (1994); In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding: Second Memorandum Opinion and Order, PP Docket 93-253, 9 FCC Rcd 7245, at para. 110 (1994); and In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding: Fifth Memorandum Opinion and Order, PP Docket 93-253, 10 FCC Rcd 403, at para. 111 (1994) ("Competitive Bidding Fifth MO&O").

¹¹/ Competitive Bidding Fifth MO&O at para. 112.

¹²/ See Amendment of Part 1 of the Commission's Rules - Competitive Bidding: Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, WT Docket no. 97-82 (rel. Feb. 28, 1997).

AT&T characterizes the relaxation of cellular attribution standards for rural telcos as a fulfillment of the Congressional mandate.¹³ However, the relaxation of cellular attribution limits is a benefit that accrues only to those rural telcos with non-controlling cellular interests in their areas. It is an adjustment of an obstacle of limited circumstance, rather than the enactment of an affirmative measure applicable to all rural telcos. By contrast, the partitioning rule was the only measure whose benefit accrued to every rural telco. The elimination of that rule, which was structured to promote the participation of rural telcos in the provision of PCS, leaves the mandate delivered to the Commission by Congress unfulfilled. The Commission, at the least, should have considered alternatives permitting all rural telephone companies the opportunities provided by Section 309(j). Accordingly, reconsideration of the rules is appropriate.

IV. THE AMENDMENT OF SPECTRUM ACQUISITION RULES AFTER ENTRY TO THE AUCTION WAS FORECLOSED IS CONTRARY TO EQUITY AND FUNDAMENTAL FAIRNESS.

Rural telcos relied on the Commission's assurance that opportunities for acquiring spectrum would be provided through partitioning.¹⁴ Rural telcos created business plans that were consistent with Commission proclamations. These strategies included plans to acquire licenses through partitioning, rather than through participation in the auction. Although GTE argues

¹³/ Opposition of AT&T Wireless Services, Inc. at 2, 3.

¹⁴/ See Competitive Bidding Fifth R&O at para. 153; Competitive Bidding Fifth MO&O at para. 112.

that rural telcos were "on notice prior to the registration date for the last broadband PCS auctions" that the rules might change,¹⁵ the "notice" of which GTE speaks was only a proposal to change the rules.¹⁶ Further, the proposal was released less than three weeks before the final registration date for the auction;¹⁷ the actual change in the rule occurred fully 20 weeks after the deadline for entry to the last broadband PCS auction had passed.¹⁸ The Commission's rescindment of exclusive post-auction license acquisition provisions after the deadline for participation in the auction had passed is inequitable, and stands in stark opposition to the principles of fundamental fairness, justness, and right dealing.

AT&T states that the change in rules might only prevent rural carriers "from getting a 'deal.'"¹⁹ Petitioners, however, do not

¹⁵/ Opposition of GTE Service Corp. at 5.

¹⁶/ Id.

¹⁷/ See In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Implementation of Section 257 of the Communications Act - Elimination of Market Entry Barriers: Notice of Proposed Rulemaking, WT Docket No. 96-148, GN Docket 96-113, 11 FCC Rcd 10187, at para. 16 (rel. Jul. 15, 1996). The deadline for registering for the last of the Commission's PCS auctions was July 31, 1996. See Public Notice, DA 96-1064 (Jul. 1, 1996).

¹⁸/ The new rules were adopted on December 13, 1996, and released on December 20, 1996; the deadline for registering for the last of the Commission's PCS auctions was July 31, 1996. See In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, Implementation of Section 257 of the Communications Act - Elimination of Market Entry Barriers: Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-148, GN Docket 96-113 (rel. Dec. 20, 1996).

¹⁹/ Opposition of AT&T Wireless Services, Inc. at 4.

seek reconsideration of the rules simply because the characteristics of the market may change as the right to acquire partitioned spectrum is accorded to more entities. Rather, reconsideration is appropriate because the Commission assured rural telcos that partitioning, as a mechanism for license acquisition, had been provided for them, and then, after the deadline for choosing participation in the auction as an alternate route to acquisition had passed, withdrew the exclusive partitioning device. The Commission's abrupt change threatens to devastate rural telcos and business plans crafted in reliance upon Commission assurances, and is the manifest breach of fairness and equity that warrants reconsideration.²⁰

V. CONCLUSION.

The Commission's elimination, without replacement, of the only wholly-applicable provision intended to promote the participation of rural telcos in the provision of PCS marks the Commission's

^{20/} U.S. West, Inc. ("U.S. West"), and Sprint Spectrum, L.P. d/b/a Sprint PCS ("Sprint") jointly filed as an Opposition to the Petition a copy of their Opposition to Motion for Stay filed in Rural Telecommunications Group v. FCC and United States of America, Case No. 97-1077 (D.C. Cir. 1997). The arguments made in that Opposition that are relevant to this proceeding are similar to those raised by AT&T Wireless Services, Inc. and GTE Service Corp., and have been addressed above. In their Opposition, U.S. West and Sprint also argued that the initial partitioning rules did not, in any event, provide rural telcos with a guarantee that they would will obtain a license. This line of reasoning is irrelevant to this Petition. The Petitioners have not asked for a guarantee. Petitioners simply contend that it is both inequitable and contrary to the statutory mandate to change the rules in the midst of the process in a manner that fails to address the underlying Congressional concern for the public interest to establish mechanisms in the spectrum auction process that foster the provision of services by rural telephone companies in their service areas.

failure to meet its Congressional mandate. Further, the amendment of spectrum acquisition rules after the deadline for entry to the auction passed is altogether inequitable. Accordingly, and for the reasons stated herein, reconsideration of the Commission's rules is appropriate.

Respectfully submitted,
NATIONAL TELEPHONE COOPERATIVE
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CERTIFICATE OF SERVICE

I, Shelley M. Bryce, of *Kraskin & Lesse, LLP*, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Reply to Oppositions to the Petition for Reconsideration of the *National Telephone Cooperative Association* and the *Independent Alliance*" was served on this 14th day of April, 1997, by first class, U.S. mail, postage prepaid, to the following parties:


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